

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DALE D. GIBBONS,

Defendant.

NO. CR-03-150-RHW

**ORDER DENYING DEFENDANT'S
MOTION UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN
FEDERAL CUSTODY**

Before the Court are Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 243); Motion for Leave to Reopen Discovery (Ct. Rec. 247); Motion of Appointment of Counsel (Ct. Rec. 248); and Motion to Continue (Ct. Rec. 249), as well as various Motions to Produce (Ct. Rec. 252 - 256).

On July 28, 2004, a jury convicted Defendant of one count of Conspiracy to Commit Wire Fraud and fifteen counts of Wire Fraud. On March 17, 2005, Defendant was sentenced to 60-months incarceration. Defendant appealed his sentence and conviction. The Ninth Circuit affirmed on January 22, 2007 (Ct. Rec. 219).

On May 19, 2008, Defendant filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Rec. 243). On November 17, 2008, the Court ordered the Government to respond to the motion (Ct. Rec. 259). On January 16, 2009, the Government filed its response.

Defendant is asserting two grounds as the basis for his § 2255 motion: (1) newly found evidence supports his claim of actual innocence; and (2) newly found evidence

**ORDER DENYING DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY ~ 1**

1 establishes that he testified truthfully at trial. Defendant is asking the Court to reverse
2 his conviction and to vacate his sentence. Notably, Defendant is not presenting a claim
3 of constitutional error at his trial or sentencing; rather he is arguing that the newly
4 discovered evidence sufficiently establishes his innocence, irrespective of any
5 constitutional error at his trial or sentencing. This type of claim has been identified as a
6 “freestanding actual innocence claim.” *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir.
7 1997).

8 Under 28 U.S.C. § 2255, a federal prisoner may move the Court to vacate, set
9 aside, or correct his or her sentence on the grounds that: (1) the sentence was imposed
10 in violation of the Constitution or laws of the United States; (2) the court was without
11 jurisdiction to impose such sentence; (3) the sentence was not authorized by law; or (4)
12 issues of collateral attack.

13 As the Government points out, neither the Supreme Court nor the Ninth Circuit
14 have definitively held that claims of actual innocence based on newly discovered
15 evidence can provide the basis for federal habeas relief. *See Herrera v. Collins*, 506
16 U.S. 390, 399 (1993); *Osborne v. District Attorney’s Office for the Third Judicial*
17 *District*, 521 F.3d 1118, 1130 (9th Cir. 2008). In *Osborne*, the Ninth Circuit explained
18 that in this circuit, courts are to assume that freestanding innocence claims are possible.
19 521 F.3d at 1130. Thus, in reviewing an actual innocence claim, the Court must first
20 resolve whether a petitioner has made an adequate evidentiary showing of actual
21 innocence before reaching the constitutional question of whether a freestanding
22 innocence claim is cognizable in habeas. *Id.* “[A] habeas petitioner asserting a
23 freestanding innocence claim must go beyond demonstrating doubt about his guilt, and
24 must affirmatively prove that he is probably innocent.” *Id.*

25 Defendant relies on the Final Report of Michael J. Missal Bankruptcy Court
26
27
28

1 Examiner¹ as newly discovered evidence that demonstrates and supports Defendant's
2 theory that he was packaging loans in exactly the fashion that he was instructed to by
3 New Century and other lenders. Defendant also indicates that at least two former New
4 Century employees are willing to testify about New Century's real practices, including
5 providing brokers with instructions and advice about how to get around New Century's
6 lending guidelines.

7 The Examiner made the following conclusions with respect to New Century
8 Mortgage's loan practices:

- 9 • New Century had a brazen obsession with increasing loan originations,
10 without due regard to the risks associated with that business strategy;
- 11 • New Century layered the risks of loan products upon the risks of loose
12 underwriting standards in its loan originations to high risk borrowers;
- 13 • In more than 40% of the loans originated by New Century, the borrowers
14 were not required to provide verification of claimed income;
- 15 • New Century made frequent exceptions to its underwriting guidelines for
16 borrowers who might not otherwise qualify for a particular loan;
- 17 • Instead of focusing on whether borrowers could meet their obligations
18 under the terms of the mortgages, the focus was on whether the loans New
19 Century originated could be initially sold or securitized in the secondary
20 market;
- 21 • Even though New Century was aware of an alarming and steady increase

22
23 ¹The Final Report is a 581 page document that was prepared by Michael J. Missal
24 who was appointed Examiner by the United States Trustee for Region 3 as part of the
25 bankruptcy proceedings of New Century Financial Corporation. (Ct. Rec. 258). In the
26 Final Report, the Examiner concluded that "New Century engaged in a number of
27 significant improper and imprudent practices related to its loan originations, operations,
28 accounting and financial reporting processes."

1 in early payment defaults on loans originated by New Century beginning in
2 mid-2004, it continued to feed the wave of investor demands without
3 anticipating the inevitable requirement to repurchase an increasing number
4 of bad loans.

- 5 • New Century gave inadequate attention to the increasing amount of
6 investor “kickouts” where investors rejected approximately \$800 million in
7 loans because of missing documentation.

8 Final Report, p. 3-6.

9 While the Final Report may undercut some of the evidence that was presented at
10 trial, it does not affirmatively prove Defendant’s innocence. *See Carriger*, 132 F.3d at
11 477 (holding that even though the newly discovered evidence casts a vast shadow of
12 doubt over the reliability of the defendant’s conviction, it serves only to undercut the
13 evidence presented at trial, but does not affirmatively prove the defendant’s innocence).

14 As the Government’s briefing points out, the Final Report does not affirmatively
15 prove that Defendant is innocent because it (1) relies on data from 2004-2007, while
16 Defendant was convicted of conduct occurring during the period from 1997-2000; (2)
17 does not establish that New Century Mortgage Corporation approved and had
18 knowledge about the specific fraudulent actions Defendant undertook to obtain
19 financing in connection with the Anderson, Triumph-Hall, and Chavez transactions
20 charged in the Indictment; (3) does not contain information specifically related to the
21 three transactions charged in the Indictment where New Century Mortgage was the
22 lender; and (4) the Final Report does not prove that the other thirteen lenders who were
23 defrauded in the other twenty transactions charged in the Indictment approved or had
24 knowledge of Defendant’s fraudulent acts. Moreover, the evidence at trial established
25 that Defendant and his co-conspirators inflated the price of the real estate and produced
26 fraudulent documents so that the lender would unknowingly be providing 100%
27 financing to the buyer/borrower. Defendant used a number of tactics to give the lenders
28

1 the false impression that the borrowers had the funds available to make significant
2 down payments on the property, such as fake gift letters purporting to give the borrower
3 large sums of money, false HUD-1 settlement statements, sham seller-second trusts that
4 were discounted to one dollar upon closing, and the temporary transfer of funds from
5 Defendant's personal account into the prospective borrower's account. Finally,
6 Defendant has not identified the two former employees or provided any affidavits from
7 them to support his claim of actual innocence.

8 Because the Court concludes that Defendant has not met his burden of
9 establishing a freestanding claim of innocence, Defendant's Motion Under 28 U.S.C. §
10 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is
11 denied. Therefore, the remaining motions are moot.

12 Accordingly, **IT IS HEREBY ORDERED:**

13 1. Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct
14 Sentence by a Person in Federal Custody (Ct. Rec. 243) is **DENIED**.

15 2. Defendant's Motion for Leave to Reopen Discovery (Ct. Rec. 247) is
16 **DENIED**.

17 3. Defendant's Motion of Appointment of Counsel (Ct. Rec. 248) is **DENIED**.

18 4. Defendant's Motion to Continue (Ct. Rec. 249) is **DENIED**.

19 5. Defendant's Motion to Produce (First Set of Requests for Production
20 Propounded Against the United States Attorney's Office) (Ct. Rec. 252) is **DENIED**.

21 6. Defendant's Motion to Produce (Second Set of Requests for Production
22 Proposed Against the United States Attorney's Office) (Ct. Rec. 253) is **DENIED**.

23 7. Defendant's Motion to Produce (Third Set of Requests for Production
24 Proposed Against the United States Attorney's Office (Ct. Rec. 254) is **DENIED**.

25 8. Defendant's Motion to Produce (Fourth Set of Requests for Production
26 Proposed Against the United States Attorney's Office (Ct. Rec. 255) is **DENIED**.

27 9. Defendant's Motion to Produce (Fifth Set of Requests for Production
28

**ORDER DENYING DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY ~ 5**

1 Proposed Against the United States Attorney's Office (Ct. Rec. 256) is **DENIED**.

2 10. Defendant's Motion to Resend Additional Documents (Ct. Rec. 268) is
3 **DENIED**.

4 11. Judgment is entered in favor of the United States and against Defendant.

5 **IT IS SO ORDERED.** The District Court Executive is hereby directed to enter
6 this Order and to furnish copies to Defendant and counsel.

7 **DATED** this 9th day of April, 2009.

8 *S/ Robert H. Whaley*

9
10 **ROBERT H. WHALEY**
Chief United States District Judge

11
12 Q:\CRIMINAL\2003\03-149-53\Gibbons\deny.wpd
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28